

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF DEPARTMENT OF FISH, WILDLIFE AND PARKS
GRIEVANCE NO. 1-2012:

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| JOHN WACHSMUTH, |) | Case No. 956-2012 |
| |) | |
| Grievant, |) | |
| |) | |
| vs. |) | FINDINGS OF FACT; |
| |) | CONCLUSIONS OF LAW; |
| |) | AND RECOMMENDED ORDER |
| MONTANA DEPARTMENT OF |) | |
| FISH, WILDLIFE AND PARKS, |) | |
| |) | |
| Defendant. |) | |

* * * * *

I. INTRODUCTION

John Wachsmuth filed an employment grievance against Montana Fish, Wildlife and Parks (FWP), alleging that his reassignment from AIS Specialist with some supervisory responsibilities to hatchery worker with no supervisory responsibilities aggrieved him in a serious matter of employment. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter in Kalispell, Montana, on July 10, 2012. Frederick Sherwood, attorney at law, represented Wachsmuth. John Lynch, attorney at law, and Rebecca Jakes Dockter represented FWP. Wachsmuth, Matt Boyer, Mike Koopal, Carolyn Schoening, Tony Cooper, Christine Caye, Jim Satterfield, Julie Sanders, Eileen Ryce, Kim Corette, Joel Tohtz, Donna Hanson, and Dave Risley testified under oath at the hearing. Wachsmuth's Exhibits 1 through 45 and FWP's Exhibits B28, B29, C, D, F, and G were admitted into the record. The parties provided closing arguments on July 18, 2012, at which time the matter was deemed submitted for decision. Based upon the evidence adduced at hearing and the oral arguments presented, the hearing officer makes the following findings of fact, conclusions of law, and recommended order.

II. ISSUE

Was Wachsmuth aggrieved in a serious matter of his employment when he was reassigned from a Grade 5 Regional Aquatic Invasive Species (AIS) Specialist with supervisory duties to a Grade 5 Resource Specialist?

III. FINDINGS OF FACT

1. Wachsmuth began his employment with FWP in 1983.
2. Over the course of Wachsmuth's employment, FWP, as part of its responsibilities to maintain water quality in various watersheds and lakes and streams in those watersheds, developed a program to mitigate the impact of Aquatic Invasive Species (AIS) that began to infest Montana waters. The program to do so became known as the AIS program.
3. Wachsmuth himself began concentrating on AIS in 1991. Because he enjoyed the AIS specialty area so much, he took it upon himself to obtain a substantial amount of advanced education on the subject, including obtaining a master of science degree from the University of Denver in 2010.
4. Wachsmuth spearheaded a boat inspection program to monitor boats brought in from other states to reduce AIS contamination of Montana waters. He was frequently commended by public and private organizations for his work. Wachsmuth was able to communicate well with the various stakeholders impacted by the AIS program. He had the ability to assuage the stakeholders to create win-win situations. *See, e.g.*, Exhibits 10 through 13. As one witness testified, Wachsmuth was instrumental in developing partnerships for advancing the goals of the AIS program. Testimony of Mike Koopal, Executive Director of the Whitefish Institute.
5. While working with the AIS program, Wachsmuth supervised part-time employees in the boat inspection program. He supervised his employees reasonably well and helped make the AIS program a success. While Wachsmuth was supervising the boat inspection program, things were "cohesive" and no one under Wachsmuth's supervision had a problem with Wachsmuth working as their supervisor. Testimony of Tony Cooper. Indeed, Wachsmuth fostered an encouraging atmosphere for the development of the AIS program among his part-time charges.
6. Unquestionably, Wachsmuth was a valuable resource for the AIS program in Northwestern Montana. He was competent, motivated, and very dedicated to seeing the AIS program become highly successful.

7. Prior to 2011, Wachsmuth was under the supervision of John Tohtz. Tohtz fairly consistently rated Wachsmuth with threes and fours (on a scale of 4) in performance appraisals of Wachsmuth's work.

8. FWP began to draft a position description for the position of AIS Resource Specialist in Region 1, a position that Wachsmuth was slated to fill. The position included supervising volunteer and short term workers. It also encompassed the ongoing interaction with regional stakeholders that was so critical to the success of the AIS program. Commensurate with Wachsmuth filling the position of Regional AIS Specialist, Wachsmuth was transferred to the supervision of Eileen Ryce, the AIS coordinator.

9. One of Wachsmuth's co-workers was Christine Caye, Region 1 Fisheries Assistant. Caye primarily worked for Tohtz. On occasion, Caye would also complete work assignments that Wachsmuth assigned to her. Wachsmuth, however, did not supervise Caye.

10. Both Wachsmuth and Caye were selected to attend a leadership training conference to be held in June 2011 in Dupuyer, Montana. Caye was tasked with making travel arrangements for both herself and Wachsmuth to that conference.

11. On June 13, 2011, Caye called Wachsmuth on Wachsmuth's personal cell phone and left a message with him about travel to the training and what Wachsmuth could or could not bring along. Wachsmuth did not answer the call and Caye left a message on his phone. This set the stage for the incident that led to this hearing.

12. At the time Wachsmuth received the call, he was not working. He was on a kayaking excursion with Cooper. Wachsmuth owns the cell phone and pays the bill for the cell phone. Unbeknownst to Wachsmuth, his cell phone (which he had just purchased and with which he was not familiar) dialed back to the number of the call that the cell phone had received, Caye's cell phone. Caye did not answer but her voice messaging came on. Wachsmuth's cell phone then proceeded to transmit the conversation he was having with Cooper all the while not knowing that the conversation was being recorded on Caye's cell phone voice messaging system.

13. Wachsmuth did not intend that his conversation with Cooper be directed at Caye and he did not and could not have known that Caye's voice messaging was recording the phone call. The recorded conversation between Wachsmuth and Cooper is for the most part muffled and unintelligible when played back on Caye's cell phone. The only audible portion of the call on the cell phone recording is at the end when Wachsmuth made what sounded like a comment to the effect of "We're

having an f—in' hard time with these women,” a comment that was obviously about his interactions with Caye.

14. Later that afternoon, Caye, who did not answer her cell phone when Wachsmuth's cell phone called back, retrieved the message. The content of the message, so inaudible that it could not be understood except for the phrase noted above, upset Caye. Still later in the afternoon, Wachsmuth called Caye back regarding her earlier message to him. Wachsmuth and Caye had a normal conversation. Caye made no mention to Wachsmuth about the conversation between him and Cooper that had been recorded on Caye's cell phone.

15. Caye took the recorded message to her supervisor who in turn contacted Region 1 Superintendent Jim Satterfield. Satterfield had to substantially enhance the audibility of the recording in order to make the recording understandable. Even undertaking the enhancement, however, did not increase the audibility except for the portion of the discussion noted above.

16. There is no question that at the time the call was first heard by Caye and subsequently by Satterfield, they knew or should have known immediately that Wachsmuth was not directing the conversation at Caye and that it was intended to be a private conversation between Wachsmuth and Cooper. Wachsmuth did not intend to have Caye hear his conversation with Cooper, and he most certainly did not intend to communicate disrespect directly to Caye.

17. Satterfield asked Caye if she wished to file a complaint with FWP against Wachsmuth about the conversation. Caye indicated that she did and she proceeded to do so. As a result, FWP launched an investigation into Wachsmuth's comment to Cooper. Ryce, Human Resources Officer Julie Sanders, and Ryce's supervisor, Bruce Rich, conducted the investigation.

18. Wachsmuth was on his way to the leadership conference in Dupuyer when FWP management summoned him to Helena to meet with Ryce, Sanders, and Rich. No one at the meeting had heard the recording of the conversation. Ryce began to question Wachsmuth about the conversation but Wachsmuth had no idea what she was talking about since he was not aware that his cell phone had called back to Caye's cell phone and then recorded the conversation. Ryce asked Wachsmuth where he had been and with whom he had the conversation. Wachsmuth blamed Caye for listening to the message. Wachsmuth also stated that he could not recall whom he had been with or where he was since management could not produce the recording of the conversation. Wachsmuth's inability to remember the conversation was not unreasonable at that point given FWP's inability at that point to provide a copy of the recording for Wachsmuth to listen to.

19. Because no one at the meeting had heard the recording of the conversation, management decided to reschedule the meeting for a time after a copy of the recording was available. Ryce informed Wachsmuth that he could not attend the leadership conference being held in Dupuyer and then sent Wachsmuth back to Kalispell.

20. After FWP obtained a copy of the enhanced recording of the conversation, they summoned Wachsmuth back to Helena on June 20, 2011 to continue the investigation. By this point, management had concluded that the conversation had not been directed at Caye and that it was meant to be a private conversation between Wachsmuth and Cooper. Ryce asked Wachsmuth to identify the person with whom he was having the conversation. At first he indicated that he could not remember. Later during the meeting, Wachsmuth stated that he did not want to reveal who he was with. He continued to blame Caye for listening to the message and insisted that his First Amendment rights had been violated.

21. Wachsmuth eventually apologized to Caye.

22. As a result of the meeting, Ryce removed Wachsmuth from the AIS program and created a different position for him within Region 1. In a memo dated July 15, 2011 (Grievant's Exhibit 30), Ryce informed Wachsmuth of the decision. The decision was not motivated by the conversation, which management either did or should have immediately understood was not workplace harassment but was a private conversation between Wachsmuth and another person that was never intended to be communicated to anyone nor to cause offense to anyone. Rather, the decision was motivated by Ryce's disappointment with Wachsmuth's response to the investigation. The reassignment was discipline because of what management perceived as Wachsmuth's improper response to the investigation.

23. Wachsmuth's new position is at the same paygrade that he was previously at, Grade 5. It does not carry with it any supervisory duties as did his previous work in the AIS program. He was assigned to fish hatcheries work at Sekokoni hatchery. Sekokoni, being a hatchery, is a moist environment that does have some mold. Wachsmuth's position description calls for about 50% of his work to be conducted at the hatchery. The new position, while different than the AIS position and carrying no supervisory responsibilities, is nonetheless an important position within the Region 1 hierarchy of positions and is important to discharging FWP's duties in Region 1.

24. Until March 2012, all of Wachsmuth's work time was spent at Sekokoni with no field work. Since March 2012, Wachsmuth has been involved in fish

hatcheries work in the field so he is no longer spending as much time at Sekokoni. Wachsmuth has been permitted to attend leadership training.

IV. DISCUSSION AND ANALYSIS¹

A FWP employee who has been aggrieved by a serious matter of employment based upon work conditions, supervision, or as the result of an administrative action may seek a hearing before the Board of Personnel Appeals. Mont. Code Ann. § 87-1-205. The burden is upon the employee to show that he has been aggrieved. If the preponderant evidence demonstrates that the employee has been aggrieved, the Board may issue an order to FWP to require action to resolve the grievance. Mont. Code Ann. § 2-18-2012; Mont. Code Ann. § 87-1-205.

In making this determination, the Board is not at liberty to decide whether it would have made the same decision as the agency. Rather, its inquiry is limited to determining whether the agency abused its discretion in making the decision. *State Board of Personnel Appeals v. Montana Dep't of Highway*, 189 Mont. 185, 189, 615 P.2d 844, 845 (1980) (finding that the Board of Personnel Appeals' determination under the auspices Mont. Code Ann. § 2-18-2012 to reverse a hiring decision by the highway department was in error where the Board substituted its judgment regarding the propriety of a hiring decision instead of limiting its review to determining whether the hiring decision amounted to an abuse of discretion).

Wachsmuth contends that he was aggrieved in a serious matter of employment when he was reassigned as a result of an accidental and unintentional transmission of a private conversation made on his own time. FWP, conceding in its closing argument that the reassignment is a serious matter of employment, nonetheless argues that the reassignment was within the confines of its management prerogatives because Wachsmuth's response to the investigation was inappropriate. Specifically, management contends that Wachsmuth's lack of candor about the conversation and with whom it was held, coupled with Wachsmuth's efforts to blame Caye who was the object of the conversation, demonstrate poor supervisory judgment and for that reason the reassignment was merited. In reply, Wachsmuth contends that management's argument that Wachsmuth's response was the reason for the reassignment was just a ruse to cover Ryce's displeasure with Wachsmuth's conversation which was the true catalyst for the reassignment.

The respondent does not contest that the action taken against Wachsmuth involves a serious matter of his employment. What the respondent is really arguing

¹Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

is that the grievant has not been “aggrieved” within the meaning of the statute because the action was justified based upon Wachsmuth’s reaction to the investigation. Unquestionably, if Wachsmuth had been reassigned solely on the basis of the private conversation that he had with Cooper, the hearing officer would have no trouble finding that FWP had abused its discretion. The conversation was private and held while Wachsmuth was off duty. It was not intended to be communicated to Caye and Wachsmuth had no thought that it would be communicated to Caye. The power to discipline employees for private thoughts and private conversations held on their own time cannot be within any legitimate prerogative of the employer.²

In this case, however, the employer contends that it was not the conversation, but Wachsmuth’s response to the investigation that ensued, that led to his reassignment. The first question to be determined, then, is whether Wachsmuth has demonstrated that management’s concern with Wachsmuth’s response was simply a ruse. Wachsmuth has failed to prove this point. It is true that management must have been aware very soon after hearing the recording that Wachsmuth was having a private conversation with another person and did not intend to direct his comments toward Caye. However, management’s continued investigation was not wholly unwarranted under the circumstances. Caye had filed a complaint and in order to discharge its duties, management had to do some investigation. Management was justified in undertaking a preliminary meeting and then reassembling after the recording was available in order to complete the investigation.

Wachsmuth’s downfall during these meetings was his failure to be candid and his shifting the blame to Caye by asserting that she should not have listened to the recorded message. Wachsmuth did not want to reveal the name of the person with whom he had been conversing. During his second meeting with management, he initially indicated that he could not remember with whom he was talking and then changed his story to indicate that he would not reveal with whom he had been conversing. Relatively shortly after the conclusion of the investigation, Ryce memorialized management’s concerns and rationale for its decision to reassign in her July 15, 2011 memo to Wachsmuth. Under these circumstances, the hearing officer does not find that the preponderant evidence demonstrates that management’s articulated concern regarding Wachsmuth’s response to the investigation was in fact a ruse.

²Condoning employer action that attempted to control employee’s private thoughts and conversations would be tantamount to condoning the public mind control exercised by Big Brother in George Orwell’s literary classic *Nineteen Eighty Four*. The employer cannot be deemed to have such power.

Having found that management's concern about Wachsmuth's response to the investigation was not a ruse, the hearing officer must next consider whether management's decision in light of its articulated concerns was nonetheless an abuse of discretion. In light of the facts as revealed at hearing, the answer is no. Again, it is important to keep in mind the Board's function here, which is not one of determining whether it would have taken the same course of action if it were management but whether management abused its discretion in taking the course of action it did.

The hearing officer cannot find on the basis of the facts before him that management went beyond the scope of permissible conduct in being concerned about Wachsmuth's response to the investigation and how that response would impact his abilities to fulfill his duties in the Regional AIS Specialist position. As Ryce noted, she was concerned that Wachsmuth "was in a highly political and sensitive position within the AIS program in R1 and I am concerned that your actions have not displayed the appropriate qualities or characteristics for that position." Grievant's Exhibit 30. Her concerns were not outside the realm of reasonableness as the position Wachsmuth was about to fulfill had supervisory duties attached to it. It had a great deal of interaction with community stakeholders that was critical to the successful implementation of the program in Region 1. Wachsmuth's inability or unwillingness to be completely forthcoming during the investigation could serve as a legitimate basis for finding that he either might not be yet up to the task of supervision or that he might under some circumstances not be completely forthcoming in his interaction with stakeholders, a trait that could impact the success of the AIS program. It also could be interpreted as a trait of intransigence that might arise under certain circumstances which again could prove detrimental to AIS's success in the community. In addition, Wachsmuth's shifting the blame for this incident to Caye who was clearly an innocent third party could reasonably be interpreted by management as indicative of inadequately developed supervisory skills that militated against placing Wachsmuth in the AIS position. Given the standard of review in this case, the hearing officer cannot say under the facts adduced at hearing that management committed an abuse of discretion in reassigning Wachsmuth based on his response to the investigation.

Finally, the hearing officer must also consider whether the assignment into the Grade 5 Resource Specialist position is of such a nature that the assignment into that position was in itself an abuse of managerial discretion. On this front, Wachsmuth has tried to portray the assignment as unhealthful and menial. The evidence does not convince the hearing officer of that. Tohtz's testimony regarding the new position shows that while it does not have the same type of importance as the AIS position might have, nor the high profile, it nonetheless is an important position within the Region 1 structure of FWP. The position was created for Wachsmuth in order to maintain him at the same paygrade. Wachsmuth has been permitted to

again enter the leadership program. The position itself only calls for Wachsmuth to spend 50% of his time in Sekokoni hatchery duties. Since March of this year, Wachsmuth has spent much of this time in the field. On balance, the new position does not appear to be so menial and consist of so much drudgery that placing Wachsmuth in the position could be considered an abuse of discretion.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 2-18-1011.

2. Wachsmuth has not been aggrieved by a serious matter of his employment due to his reassignment.

VI. RECOMMENDED ORDER

Based on the foregoing, the hearing officer recommends that Wachsmuth's grievance regarding his reassignment be denied.

DATED this 17th day of August, 2012.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.403(3)(c), this RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are filed, postmarked no later than September 10, 2012. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.403(3)(c), and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 201503
Helena, MT 59620-1503